THOMAS CARL MICHAEL

v.

PERKASA PADU SDN BHD & ORS; MALAYSIAN ASSURANCE ALLIANCE BHD & ANOR (THIRD PARTIES)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[SUIT NO: S2-22-292-1996]
10 NOVEMBER 1999

CIVIL PROCEDURE: *Striking out - Application by 2nd named third party - Whether there was an issue to be decided upon - Whether 2nd named third party conceded to this - Whether application should be struck out in view thereof*

The plaintiff sued the 1st defendant on a breach of contract of employment. He also based his claim against the 1st and other defendants on negligence. The 2nd, 3rd and 4th defendants took out third party proceedings against the 1st named third party as the insurers and subsequently against the 2nd named third party as the main contractor of the project concerned therein and also because the 2nd named third party was named as the "Insured" in the Contractors All Risk Policy.

The 2nd named third party applied to the Senior Assistant Registrar under O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court for an order that the 2nd, 3rd and 4th defendants' claim against it be struck off with costs. This application was dismissed with costs. Hence, the instant appeal.

Held:

[1] Since the 2nd named third party conceded to the issue that whether it should indemnify the plaintiff or not rested upon the interpretation of cl. 10.01 of the sub-contract agreement between the 2nd named third party and the 3rd defendant, it could not contend that there was no case against it to warrant this application to strike out.

[2] So long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial would not be a ground for the pleadings to be struck out.

[Appeal dismissed.]

Case(s) referred to:
Citibank Bhd v. N.D. Chandrasegaram Nee & Ors [1999] 6 CLJ 15 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19

For the appellant/2nd named third party - Mohd Zaini Mazlan (Omar Adam Hon with him); M/s Lee Choon Wan & Co
For the 2nd, 3rd and 4th defendants - Manjit Singh; M/s Azman, Davidson & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

The plaintiff sued the 1st defendant on a breach of contract of employment. He also based his claim against the 1st defendant and all the other defendants on negligence. The 2nd, 3rd and 4th defendants took out third party proceedings against the 1st named third party as the insurers and subsequently against the 2nd named third party, on the basis that the 2nd named third party was the main contractor in respect of the project and also because the 2nd named third party was named as the 'insured' in the contractors all risk policy.

The Application

The 2nd named third party then took out an application (encl. 60) pursuant to O. 18 r. 19 of the Rules of the High Court 1980 and under the inherent jurisdiction of the court for an order that the 2nd, 3rd and 4th defendants' statement of claim against the 2nd named third party be struck out with costs.

The case for striking out was on the basis that:

(1) the 3rd defendant was, pursuant to the provisions of the sub-contract, responsible for the plaintiff's claim;

(2) according to the sub-contract the 2nd named third party was only responsible for taking an insurance policy and nothing more than that;

(3) the issue of damages is in law and in fact to be decided between the 2nd 3rd and 4th defendants and the 1st named third party; and

(4) the 2nd named third party should not be responsible for the plaintiff's claim for income, allowance, transportation and other needs.

Having heard the arguments the learned Senior Assistant Registrar reserved judgment and on 9 July 1999 dismissed encl. 60 with costs.

The Appeal

In arguing the appeal before me, Encik Zaini for the appellant, conceded that the 2nd named third party was indeed the main contractor for the project known as K.L. Towers. He referred me to cl. 10.01 of the sub-contract agreement between his client, the 2nd named third party and the 3rd defendant, the sub-contractor. The said clause reads as follows:

> The Contractor will effect and maintain or cause to be effected and maintained insurances (copies of which shall be available for inspection by the sub-Contractor) in the joint names of the Contractor, the Government of Malaysia, the Employer and, if applicable, any bank financial institution as the Contractor may decide (which policies shall not include any coverage for consequential loss or damage) as the following basis.

In the course of his submission counsel conceded that whether the 2nd named third party should indemnify the plaintiff or not, called for the interpretation of the said cl. 10.01. Once counsel conceded to this I did not wish to hear any further arguments nor did I want to hear from the respondents.

If the 2nd named third party was of the view that the case rested upon the interpretation of cl. 10.01, surely by no stretch of the imagination could the 2nd named third party contend that there is no case against it, to warrant this application to strike out. In *Citibank Bhd v. ND Chandrasegaram Nee & Ors* [1999] 6 CLJ 15 I held that so long as the pleadings disclosed some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial would not be a ground for the pleadings to be struck out. I applied the same principle to this case and dismissed the appeal with costs.